Supreme Court, U.S.
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(6)

No. 99-1908

In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents the question whether Congress intended to create a private cause of action that would allow private individuals to sue State agencies that receive federal funds to enforce disparate impact regulations promulgated by federal agencies pursuant to Section 602 of the Civil Rights Act of 1964. As the question states, those private lawsuits bypass the federal agency review and enforcement procedures that Congress established in the text of Section 602. *See* App. at 258a. In this case, the Eleventh Circuit Court of Appeals held that private individuals could sue the Alabama Department of Public Safety and require it to modify its practice of giving the written examinations for private driver's licenses only in the English language so as to avoid engaging in a practice alleged to have a disparate impact based on national origin. As a result, the federal courts have told the Department to make accommodations, even though the grantor federal agencies never invoked the statutorily-specified agency review and enforcement procedures.

The issues raised by the Petition are of fundamental importance. Federal agencies make a multitude of grants each year. An implied private right of action would expose all of the grantees to lawsuits coming from a wide range of directions. Contrary to Respondent's contention, the number of Title VI disparate-impact lawsuits against federal grantees is increasing. The federal agencies are also becoming more active. Amici Washington Legal Foundation and Allied Educational Foundation cite draft guidance published by the Environmental Protection Agency and the United States Department of Education

as well as a July 14, 1994 Memorandum from Attorney General Janet Reno to all "heads of departments and agencies that provide federal financial assistance" instructing them to "ensure that the disparate impact provisions in your regulations are fully utilized." Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Petitioners at 16-17, *Alexander v. Sandoval* (No. 99-1908).[1] The Eleventh Circuit's ruling opens the door to a flood of litigation.

The Eleventh Circuit's ruling not only allows private litigants to sue federal grantees, it gives them a new basis for doing so. The Eleventh Circuit affirmed a District Court ruling that linked language to national origin through a disparate impact analysis. As a result, the federal courts have prohibited the Alabama Department of Public Safety from testing driver's license applicants only in English and have required it to provide written examinations in foreign languages. What else must federal grantees translate to avoid having a disparate impact based on national origin, and into what languages?

Grantees faced with language claims will also be treated differently in the Eleventh Circuit. The Second, Fifth, and Seventh Circuits have declined to equate language to national origin. *See Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. den.*, 466 U.S. 929 (1984); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 687 (5th Cir. 1981); *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999). Each

[1] The United States intervened in the Eleventh Circuit in support of Respondent.

of those courts has refused to make a public agency translate forms into foreign languages. Grantees in the Eleventh Circuit can now be required to do so.

Four amicus briefs urging this Court to grant certiorari – filed by English Language Advocates and English First Foundation, by Pacific Legal Foundation and the Center for Equal Opportunity, by Washington Legal Foundation and Allied Educational Foundation, and by U.S. English – attest to the importance of the question presented.

In this Reply Brief, Petitioners respond to the suggestions that the courts have answered the question presented and that this case is not ready for this Court's review. First, put simply, this Court has not answered the question presented, and, two years ago, it granted certiorari in *Seif v. Chester Residents Concerned for Quality Living, cert. granted*, 524 U.S. 915 (1998), *cert. dismissed as moot*, 524 U.S. 974 (1998), for that reason. Second, Petitioners filed their appeal after a trial on the merits and appealed from an injunction that had both prohibitive and directive elements. There are no procedural barriers to review. Finally, the application of the disparate impact regulations in this case is fairly embraced in the question presented because it shows the consequences of bypassing the remedial scheme that Congress enacted in Section 602.

1. Respondent's suggestion that this Court should not revisit 25 years of precedent, Br. in Opp. 11-26, is misleading because this Court has no such body of precedent. This Court granted certiorari only two years ago in *Seif v. Chester Residents Concerned for Quality Living*, No.

97-1620, in order to resolve the same question that this case presents. If the existence of an implied private right of action to enforce agency regulations had been clearly established in 1998, there would have been no reason to grant certiorari. Moreover, in *Chester Residents*, this Court granted certiorari in the face of most of the same arguments that Respondent now makes in this case. *See* Brief in Opposition to Petition for Writ of Certiorari at 9-12, 14-15, *Seif v. Chester Residents Concerned for Quality Living* (No. 97-1620).

Contrary to Respondent's suggestion, this Court has not resolved the question. Only two circuit courts of appeals (the Eleventh Circuit in this case and the Third in *Chester Residents*) have explained how they reached the conclusion that there is an implied private right of action under Section 602, and neither of them states that this Court has answered the question. *See* App. at 42a ("[T]he Court has yet to squarely answer the question before us. . . . "); *Chester v. Residents*, 132 F.3d at 932 ("[T]he applicable Supreme Court precedent is not dispositive. . . . "). Accordingly, the only precedent is that established by the courts of appeals. But, only two courts of appeals have explained their conclusion, and this Court vacated the Third Circuit's decision. *See Chester Residents*, 524 U.S. 974 (1998). Moreover, the courts of appeals were in accord when this Court granted certiorari in *Chester Residents* demonstrating that a conflict in the circuits is not a prerequisite for certiorari when the Petition presents an important question of federal law that this Court has not resolved. *See* Sup. Ct. R. 10(c).

Alexander v. Choate, 469 U.S. 287 (1985), summarized the then-existing Title VI jurisprudence. The Court did

not state that either *Lau v. Nichols*, 414 U.S. 563 (1974), or *Guardians Assn. v. Civil Service Comm'n. of New York*, 463 U.S. 582 (1983), resolved the question. Rather, it said, "No opinion commanded a majority in Guardians, and Members of the Court offered widely varying interpretations of Title VI." *Alexander*, 469 U.S. at 293. The Court then summarized a "two-pronged holding" in *Guardians*:

> First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions ~~having~~ an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.

Id. (footnotes omitted). Again, in *Alexander*, the Court did not state that private individuals could enforce agency regulations.[2] Not only did the Court not say that in *Alexander*, it has not said it since.

Indeed, in *United States v. Fordice*, 505 U.S. 717 (1992), this Court rejected an attempt by private petitioners to assert a claim regarding affirmative action required by Title VI regulations. The Court stated:

> Private petitioners reiterate in this court their assertion that the state system also violates Title VI citing a regulation to that statute that requires States to "overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i) (1991). Our cases make clear, and the parties do not

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[2] To the extent that the Court considered issues raised by a private litigant in *Alexander*, any approval is tacit. Such tacit approval also relates only to lawsuits brought under the Rehabilitation Act, 29 U.S.C. § 794. The private litigant in *Alexander* proceeded under the Rehabilitation Act, not Title VI.

> disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. [Citing *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Guardians*]. We thus treat these issues as they are implicated under the Constitution.

Id. at 732 n.7. Respondent suggests that this footnote "does not signal a retreat from the conclusion that private parties may enforce agency regulations," Br. in Opp. at 18, but the effect of the footnote is to preclude those private parties from enforcing the cited regulation. If this Court had previously recognized an implied private right of action to enforce agency disparate impact regulations, there would have been no need for the footnote.

Measured against the background of this Court's opinions, the decisions of the courts of appeals are not persuasive. Again, only two circuits have explained how they reach the conclusion that there is an implied private right of action under Section 602. The rest simply assert or assume that it exists. The Eleventh Circuit relied on its own understanding of this Court's opinions, *see* App. at 42a-48a, and the Third Circuit relied on its precedent regarding the enforceability of regulations.[3] *See Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999).[4] Neither court looked at the intent of Congress, which is the fundamental question. *See Middlesex County Sewerage Auth. v. National Sea Clammers*

[3] The question whether the regulations are valid is fairly embraced in the question whether private litigants may enforce them.

[4] Unlike this case, which comes to this Court after a full trial, *Powell v. Ridge* came on a ruling on motion to dismiss.

Assn., 453 U.S. 1, 13 (1981). This Court should grant the Petition and examine this fundamental question.

2. Respondent contends that this case is not ripe for review because it is interlocutory and there is an unresolved § 1983 claim. Br. in Opp. 6-11. Respondent is mistaken because Petitioners appealed from a judgment and permanent injunction after a trial on the merits. That permanent injunction prohibited Petitioners from continuing to test only in English and directed Petitioners to take affirmative steps to accommodate "Alabama's non-English speaking residents who seek Alabama driver's licenses." App. at 253a. When the District Court stayed the injunction, it "DIRECTED [the parties] to abide by the terms of their agreement as set forth in their July 9, 1998, Joint Motion." That agreement calls for the Department of Public Safety to test in seven foreign languages: Spanish, German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese. Supp. App. at 5a. Respondent contends that this is not enough: Petitioners must not only expand the number of languages, they must also make "some provision beyond use of mere translation dictionaries . . . for non-English speaking applicants whose languages are not available in the written exam." Supp. App. at 8a-9a. Petitioners will clearly be required to take affirmative action to remedy the regulatory violation found by the District Court. This case should not be considered interlocutory when only some of the details of the imposed relief remain undefined.

The presence of an unresolved § 1983 claim does not preclude certiorari either. The District Court reserved ruling on the § 1983 claim after a trial on the merits at the conclusion of which it "granted the Defendants' motion

for judgment as a matter of law on Plaintiffs' intentional discrimination claims." App. at 64a n.4. As the Eleventh Circuit notes, that claim is unresolved because Respondent wanted it that way: "In this case, plaintiffs relied on Section 602 directly rather than basing their cause of action on Section 1983." App. at 45a n.21. Respondent should not now be heard to leverage her choice into a procedural barrier. Moreover, Respondent's present construction of her § 1983 claim does not match the claim that she pled. As pled, her § 1983 claim, which was made under the Fourteenth Amendment, requires a showing of intentional discrimination, not disparate impact like the regulatory claim that the District Court ruled on. *See, e.g., Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 238-39 (1976). While § 1983 provides Respondent with a vehicle for vindicating her Fourteenth Amendment rights, it is doubtful that it provides the basis for a private right of action to enforce Section 602 regulations. *See Middlesex Sea Clammers*, 453 U.S. at 13-15. In any event, this case is no different from any other in which a District Court rules in one party's favor on one ground without ruling on each and every claim and defense. The ruling on that ground can be reviewed on appeal, and the case remanded if necessary.

Respondent's suggestion that she can prevail as a third-party beneficiary lacks merit. If Congress did not intend to create a private right of action that would permit Respondent to enforce the regulations directly, it is very unlikely that it intended to allow her to proceed indirectly. *See Suter v. Artist M.*, 503 U.S. 347, 363 (1992). Moreover, the grants that form the basis for liability do

not convey any direct benefit to Respondent. None of the grants funded the testing of driver's license applicants. Conversely, the direct, and presumably intended, beneficiaries of grants to fund trooper overtime for speed limit or DUI enforcement are the members of the driving and road-using public, not applicants for driver's licenses. Absent a directly-conveyed benefit, Respondent lacks the interest necessary to give her either standing or third-party beneficiary status. *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Suter v. Artist M.*, 503 U.S. at 363.

3. Respondent is incorrect in her contention that how the disparate impact regulations will be applied in this case is irrelevant. Br. in Opp. 24-27. The uses to which the implied private right of action can be put are fairly embraced in the fundamental question of Congressional intent. The statutory language of Section 602 imposes notice and timing limits on agency enforcement actions. Private actions are subject to no such limitations. Did the same Congress that imposed those limits on agency actions intend that private litigants would be able to require state agencies to give driver's license examinations in foreign languages? Did that Congress intend that private litigants could attack the siting of state highways or wastewater treatment facilities? *See Bryant v. New Jersey Dept. of Transportation*, 987 F. Supp. 343 (D.N.J. 1998), *vacated in part*, 998 F. Supp. 438 (D.N.J. 1998); *Chester Residents*, respectively. Those are, however, some of the ways in which an implied private right of action is being used.

The question presented also fairly includes the question whether, as a matter of contract interpretation, the grants can be read to require Petitioners to provide

remedies that include testing in foreign languages. Such an obligation must be clearly spelled out in the contract, *see, e.g., Blessing*, 520 U.S. at 341, and ambiguities are to be construed against the drafter. *See, e.g., United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806). Neither a general disparate impact regulation nor a Department of Justice regulation that applies when "a *significant* number or proportion of the population eligible to be served or likely to be *directly affected* by a federally assisted program . . . needs service or information in a language other than English," *see* 28 C.F.R. § 42.405(d)(1) (1976) (emphasis added), provides the necessary notice. Alternatively, if a grantor agency believes that it does, the agency should enforce its interpretation in compliance with the procedures that Congress specified.

For the reasons stated above and in the Petition, this Court should grant the petition for writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	**Case No. CV-96-D-1875-N**
L.N. HAGAN, et al.,	)	
Defendants.	)	

JOINT MOTION FOR ENTRY OF STAY

Martha Sandoval, individually and as representative of all others similarly situated, plaintiff in this action, and L. N. Hagan, in his official capacity as Director of the Alabama Department of Public Safety, and the Department of Public Safety, defendants in this action, jointly request this Court to enter a stay of its injunction pending Hagan's and the Department's appeal. The joint request is made pursuant to the terms of the letter attached hereto.

WHEREFORE, this Court should stay its injunction pending appeal.

Respectfully submitted,

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for Martha Sandoval

/s/ John J. Park, Jr.
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July 9, 1998

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Re: *Sandoval v. Hagan, et al.*

Dear Richard:

Pursuant to our conversations, I write to set forth the basis on which the parties have agreed to the District Court's entry of a stay. More specifically, you have agreed to the entry of a stay in exchange for the Department's implementation of a plan for testing in languages other than English or otherwise accommodating applicants who are not able to read or write English. As you understand, the Department's implementation of the program would not be "voluntary." The District Court has directed the Department to implement a program, the Department plans to appeal, and it is not ceasing the English-only testing program voluntarily.

Nonetheless, on an interim basis, the Department is willing to implement a program of testing in languages other than English as set forth below:

1. The Department will procure translations of the examination(s) in the following languages: Spanish, German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese. The Spanish language examination will be available at all examination stations within sixty (60) days after the District Court's entry of a stay, and the German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese language examination will be available at the district headquarters offices within 120 days after entry of a stay. At present, there are seven (7) such district headquarters offices, but the number may be reduced to five (5) due to budget limitations. Any reductions in the number of district headquarters offices will affect not only driver's license activities but also highway patrol and ABI and will not be made with the intent to discriminate on an invidious basis because English speakers will suffer too.

2. An applicant who wishes to take the examination in German, Korean, Japanese, French, Mandarin Chinese, or Vietnamese may call the district headquarters office one week in advance to request that an appropriate foreign-language translation be taken to an examination station. Such applicant will have to identify the examination station, the date of the examination, and the language involved. Absent such advance notice, the applicant can take the foreign-language examination at the district headquarters office.

3. Applicants who desire to be tested in any other language will be offered the opportunity to use a translation dictionary subject to the stipulation that the Examiner shall be entitled to inspect and approve the dictionary before use.

4. The Department shall continue to administer the road skills tests as it has done to date. To assist persons who are not proficient in English, the Department will continue to have its examiners take such steps as using hand signals, using the flash cards developed to assist hearing-impaired applicants, and explaining to the applicant, through the applicant's interpreter as described in paragraph 5, the nature of the test (*e.g.*, what the applicant may be asked to do and the types of commands the examiner may use during the test).

5. Applicants who do not speak English will be entitled to the assistance of an interpreter for administrative purposes. The interpreter may assist in the application process and may help give administrative instructions to the applicant. The assistance of an interpreter will not be permitted on the written examination or the road skills tests other than with respect to administrative instruction.

6. The Department and Hagan shall be entitled to proceed with their appeal.

7. This interim procedure shall last until the stay is lifted. It shall not be subject to the oversight of the District Court, the Southern Poverty Law Center, or anyone else.

8. The Department reserves the right to modify this interim program, but shall have no obligation to do so. As

a courtesy, the Department will notify plaintiffs' counsel of any modifications to the interim program. If the plaintiffs believe that the modification undermines the interim program, plaintiffs may petition the Court for relief.

9. The Department's and Hagan's implementation of this interim program are expressly understood not to be voluntary. Plaintiffs further acknowledge that the possibility that the Department will resume its practice of testing only in English if the Department prevails on appeal is reasonably to be expected.

10. If and when the stay is lifted, plaintiffs reserve the right to claim that a program such as the Department's interim program does not comply with the Court's Order. Hagan and the Department likewise reserve any right they may have with respect to remedy.

Please let me know if this proposal is acceptable to you. If so, you or Rhonda could sign below, and we could then submit the fully signed letter to the court with a Joint Motion for Entry of Stay.

Very truly yours,

/s/ John J. Park, Jr.
John J. Park, Jr.
Assistant Attorney General

cc: Robert E. Morrow, Esq.

JJPjr/pc

AGREED TO
BY:

/s/ J. Richard Cohen
One of the Attorneys for
Martha Sandoval

SPLC [LOGO]

SOUTHERN POVERTY LAW CENTER

Litigation & legal Affairs
Teaching Tolerance
Intelligence Project
Klanwatch
Militia Task Force

[Address Omitted In Printing]

May 2, 2000

Via Fax and Regular Mail

John J. Park, Esq.
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Montgomery, AL 36104

Re: *Sandoval v. Hagan*

Dear Jack:

Judge DeMent's order directs us to meet and confer to resolve attorneys' fee issues and "all other remaining issues in this case" by May 10, and to file a joint pleading on the matters by May 15. By referring to "all other remaining issues," we assume Judge DeMent means the remedy to be issued in the case. If the State intends to file a petition for certiorari review and you want a stay of Judge DeMent's order, we won't oppose your motion. Just let us know as soon as possible.

In the meantime, we are drafting a proposal for fees and intend to get it to you by May 5. Regarding the relief to be issued, Judge DeMent's original decision ordered that "the Defendants shall, in conjunction with the Plaintiffs, fashion proposed policies and practices for the

accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." The Judge's order that the State make the initial proposal is, of course, consistent with principles of federalism. We'd like to get your proposal by May 5, if possible.

When drafting proposed policies and procedures, we'd like you to consider a few points. First, although the seven foreign languages in which the test is currently available may have seemed adequate when you drafted the interim testing program, the fact that the State previously utilized twice the number of foreign languages probably demonstrates that an expanded number of languages is both practical and necessary. Second, we believe that it's important that some provision beyond use of mere translation dictionaries be made for non-English speaking applicants whose languages are not available in the written exam. As the trial testimony demonstrated, translation dictionaries are practically useless for translation of the written exam, and the State's fear that interpreters will help applicants to cheat is unfounded.

We'd like to meet to discuss these matters by May 8 or 9, after we've reviewed each other's proposals. Please get back to me or Richard as soon as possible.

Thanks.

Sincerely yours,

/s/ Rhonda
Rhonda Brownstein